

<sup>1</sup> The Board notes that following the May 29, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

On March 26, 2003 appellant returned to part-time work as a driver for a private-sector rental car agency. On December 7, 2004 OWCP issued a formal loss of wage-earning capacity (LWEC) determination which found that his actual, part-time earnings fairly and reasonably represented his wage-earning capacity and reduced his compensation.

Appellant thereafter requested modification of the December 7, 2004 LWEC determination. OWCP last denied modification of the December 7, 2004 LWEC determination by decision dated February 21, 2018.

On March 13, 2018 appellant requested reconsideration of the February 21, 2018 decision. He asserted that a July 4, 2013 report from Dr. Manual Portalatin, a family practitioner, was sufficient to support both a material worsening of his employment-related condition and total disability.<sup>2</sup>

By decision dated May 29, 2018, OWCP denied appellant's request for reconsideration without conducting a merit review pursuant to 5 U.S.C. § 8128(a).

The Board finds that this case is not in posture for decision.

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.<sup>3</sup> The burden of proof is on the party attempting to establish a modification of the LWEC determination.<sup>4</sup>

Although appellant used the term reconsideration in his correspondence received on March 13, 2018, he contended that OWCP committed error in its February 21, 2018 decision because Dr. Portalatin's July 4, 2013 report was sufficient to support both a material worsening of his employment-related condition and total disability. The Board therefore finds that the March 13, 2018 letter constituted a request for modification of the December 7, 2004 LWEC determination.

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.<sup>5</sup>

As OWCP improperly reviewed the case under the standard for a timely reconsideration request, the case must therefore be remanded to OWCP for a proper decision which includes

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<sup>2</sup> By decision dated August 22, 2016, the Board had reviewed Dr. Portalatin's July 4, 2013 report solely regarding the issue of whether an attendant's allowance should be authorized. The Board did not review this report to determine if it established a material change in the nature and extent of appellant's injury-related condition. Moreover, OWCP also had not reviewed this report to determine if it was sufficient to establish a material change in appellant's injury-related condition. Docket No. 15-1239 (issued August 22, 2016).

<sup>3</sup> A.S., Docket No. 18-0370 (issued March 5, 2019).

<sup>4</sup> *Id.*

<sup>5</sup> *L.P.*, Docket No. 18-1429 (March 8, 2019).

findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of his LWEC determination.<sup>6</sup> The Board consequently remands the case to OWCP for proper adjudication, to be followed by a *de novo* decision.

**IT IS HEREBY ORDERED THAT** the May 29, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: July 29, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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<sup>6</sup> See *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).